United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7360

To be argued by
WILLIAM K. MADDEN

In The

United States Court of Appeals

For The Second Circuit

THERMAL UNIT CORPORATION,

Plaintiff-Appellant,

-against-

YORK-SHIPLEY, INC.

Defendant-Respondent.

On Appeal from a Judgment of the United States District Court for the Eastern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF THE NATURE OF THE CASE AND THE FACTS

Thermal Unit Corp. was a seller and installer of York-Shipley boilers. Thermal Unit would solicit customers and place orders with York-Shipley to manufacture the boilers which Thermal-Unit would later install. All business was conducted between York-Shipley, Thermal Unit, and the ultimate customer.

FIRST CAUSE OF ACTION

Thermal Unit had received, on July 30, 1974, a purchase order in the amount of $66,500 from Tuck Industries Inc. This order was for the purchase and installation of one York-Shipley boiler, model 597 SPH-700-6N *(14a). Tuck Industries had requested installation on or before November 10, 1974.

On July 16, 1974, an order was issued by Thermal Unit to York-Shipley for the subject boiler (18a-19a). The order, sent by Thermal Unit, was accepted by York-Shipley, with date of shipment stated on the quotation as "11/10/74 or before." (Pl. Ex. 2(a)) (87a).

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*All numbers in parenthesis refer to pages in the appellant appendix unless otherwise indicated.

On August 9, 1974, written notification was given to Thermal Unit by York-Shipley that delivery could not be made until the week of November 25, 1974 (20a). The notification stated that shipment of the manufactured boiler would take place upon receipt of certified check in advance. This date was accepted by Thermal Unit on the basis there would be no further delay in the shipment. (Pl. Ex. 4).

On September 30, 1974, Thermal Unit received from York-Shipley another memo stating shipment would again be delayed--this time for almost a full month to December 16, 1974 (22a). The reason given for delay, in this memo, were "problems encountered in procuring material" and "delay in production scheduling." (Pl. Ex. 7). The reason for this delay was in direct contradiction to the reasons given in the previous month's memo that stated Thermal Unit must send full payment in advance for shipment.

On October 9, 1974, another memo was received by Thermal Unit from York-Shipley, again stating that the order had again been delayed--this time to the week of January 6, 1975 (21a). The reasons for this delay were again that there were problems of material and production scheduling. (Pl. Ex. 5).

The customer, Tuck Industries, by reason of the cold weather and late prop sed date of installation, was

forced to cancel the order with Thermal Unit (39a-40a). As a result of York-Shipley's breach in delay of performance, Thermal Unit suffered loss of profit and loss of good will to his business.

SECOND CAUSE OF ACTION

An order was placed by Imperial Finishing Co. with Thermal Unit for three York-Shipley boilers (model no. 240 SPH-60-2N) in the amount of $27,200 (tr 32-33). The order was acknowledged and accepted, by York-Shipley, in a quotation on July 22, 1974 (26a-27a).

A memo was received from York-Shipley stating the order would be shipped upon receipt of certified check in advance (Pl. Ex. 12)

On September 25, 1974, there was a request made by York-Shipley for a release that would not hold them responsible for meeting the Department of Air Resources regulations in relation to that boiler (29a). On the same day, a release of such responsibility was mailed to York-Shipley by Thermal Unit (Pl. Ex. 13)

On March 7, 1975, almost six months later, York-Shipley had still not started work on the boilers. A letter was received on that date, with an accompanying memo, stating that York-Shipley decided "not to chance" building the units without approval (Pl. Ex. 14)

At the original contract time, on July 22, York-Shipley stated in their quotation that delivery would be

made in "4-6 weeks"--now almost eight months later they had not even started construction of the boilers. In a letter dated March 20, 1975, York-Shipley cancelled this contract (Pl. Ex. 9).

II

PROCEEDINGS IN THE COURT BELOW

The Trial Court held that Thermal Unit failed to prove York-Shipley liable in the first cause of action. In the second cause of action, the court awarded damages to Thermal Unit in the amount of $4,195.

This action was commenced on March 31, 1975, by service of a summons and complaint which set forth two causes of action for breach of contract. York-Shipley served on Thermal Unit an answer admitting to the existence of a contract in both instances and which made reference to term in the contract for payment in advance of shipment (46a).

Trial began on March 31, 1976 with the swearing in of Kenneth Peters, President of Thermal Unit, and the introduction of evidentiary material (12a). On cross-examination of this witness, York-Shipley presented for the first time their defense of impossibility (35a-38a). The proceedings ended this day with the testimony of Lavern Brennaman, President of York-Shipley, on direct examination.

Upon commencement of the second day of trial (April 1, 1976), Thermal Unit made a timely objection (46a) to York-Shipley's assertion of the defense of impossibility. Trial Court denied this motion and

permitted York-Shipley to amend the pleadings to the proof (47a).

The trial continued at this point with the cross-examination of Brenneman who continued to assert the defense of impossibility (48a).

York-Shipley then called John A. Janssens as witness. Janssens testified that he had spoken to Mr. Peters about the steel shortage (50a) and later explained about D.A.R. approval.

Upon summation, Thermal-Unit asserted the position that according to the proof established by the documentary evidence, York-Shipley was trying to remove itself from the contract because he believed it to be a bad business bargain(53a-69a).

York-Shipley, in their summation, tries to establish that Thermal Unit nad knowledge of the particular difficulties that arose in York-Shipley allegedly not obtaining the steel on time--or should have known of such difficulties (70a-75a). It later tries to re-establish the defense of impossibility (76a-78a) and finally contends there were no damages proven (78a-80a).

The Trial Court's decision was given orally immediately following summations by both sides after a brief review of the in-depth documentary evidence (81a).

The Court rejected Thermal Unit's position in the

first cause of action regarding the Tuck boiler (82a). particularly citing as reason the steel strike allegedly plaguing the industry at this time. The Court awarded damages of $4,195 on the second cause of action regarding the Imperial contract (84a-85a).

The Court made no mention whatsoever as to damages for good will in either the first or second cause of action.

III

QUESTIONS PRESENTED

1. Was there sufficient evidence to establish that there was a condition of emergency to excuse York-Shipley from performance?
2. Should the Trial Court have permitted York-Shipley to plead the defense of impossibility? The Trial Court answered this in the affirmative.
3. Was York-Shipley's defense of non-payment, in their answering papers, with merit? The Trial Court did not address itself to this question.
4. Did York-Shipley owe a duty to allocate materials to Thermal Unit? The Trial Court did not address itself to this question.
5. Should Thermal Unit be awarded damages for loss of good will in both the first and second cause of action? The Trial Court did not address itself to this question.

IV

ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN HOLDING A CONDITION OF EMERGENCY EXISTED THAT EXCUSED YORK-SHIPLEY FROM PERFORMANCE OF THE CONTRACT, IN THE FIRST CAUSE OF ACTION

The Trial Court erred in stating there was a condition of emergency in the industry at the time that resulted in York-Shipley not receiving their requested material from their particular mills.

The Court states:

> The Court finds from the evidence that at the time in question a condition of emergency had developed in the steel industry, that the particular boiler in question required a special kind of heavy steel plate for which there was but a limited supply. . . that because of a contemporaneous or prior steel strike steel companies had shut down their furnaces (82a).

The Trial Court clearly states it bases its decision on a "contemporaneous or prior steel strike." This

is wrong. A cursory review of the record proves that such was not the case.

The order for the Tuck boiler was placed in July of 1974 (Pl. Ex. 2). Upon direct examination of York-Shipley's own witness, Lavern Brenneman, the issue of the steel strike is first discussed. Brenneman testified that the coal strike began in December 1974 (44a). There was no coal strike, therefore, till almost a half-a-year after the order was placed.

Brenneman states that the only place he thought possible to obtain the steel was Bethlehem Steel at their Sparrows Point plant (44a). He testified that "after the coal strike had started" they were advised by Bethlehem that steel shipments would be delayed (44a).

What was York-Shipley doing then for five months before the strike started? Brenneman states there was a "booming economy" that restricted steel deliveries. However, the Trial Court, in deciding the first cause of action, ignored York-Shipley's contention of a "booming economy", that Brenneman aptly misnomered, and relied totally on the alternate contention of a steel strike.

The Court, however, was mistaken as to the dates of the strike. It <u>was not</u> "contemporaneous or prior" to the dating of the contract. It <u>was not even</u> "contemporaneous or prior" to the conflicting memos sent to

Thermal Unit that continually delayed the shipment. It was five full months from the date of the contract till the strike took place, as evidenced from Brenneman's own testimony.

The decision in the first cause of action must therefore be reversed. The Trial Court based its decision on a "contemporaneous or prior steel strike" and did not give controlling weight to York-Shipley's weak assertion for a "booming economy".

Therefore, the appellant moves that the decision in the first cause of action be reversed because the Trial Court erred in interpreting the evidence as proven by York-Shipley's own witness's testimony. Appellant moves that relief be granted in the amount requested in the complaint.

POINT 2

TRIAL COURT ERRED IN PERMITTING YORK-SHIPLEY AT TRIAL TO AMEND PLEADINGS AND MAINTAIN THE DEFENSE OF IMPOSSIBILITY OF PERFORMANCE

York-Shipley, in this case, had stipulated in their "Answer" certain defenses. Included among these, in paragraph 3, was a reference to the term on the contract dealing with payment that was to be made in advance. It further goes on to allege, in paragraphs 5 and , a counterclaim against Thermal Unit which its attorneys subsequently had quashed. Nowhere in the two page answer is there any allegation of impossibility of performance on their part. Indeed, in their "Answer", paragraph 1, admits to the existence of such an agreement and again only refers to the "payment in advance" clause contained in the contract.

However, at trial, York-Shipley proceeded to prove the defense of impossibility. There was no hint of such a defense till trial, when York-Shipley went forward with their contention of impossibility. York-Shipley argues that their answer, where it "refers to terms including payment in advance of shipment" opens the door to such a defense (46a). There were twenty such terms in the

contract of which they specifically placed one in their answer. To state that those three words, "refers to terms", opened their defense to all those conditions is ridiculous. Thermal Unit would have had to play a guessing game as to which term to refute, rather than the logical and true defense specified in their answer.

Further, in the Examination Before Trial of Kenneth Peters, President of Thermal Unit, the attorney for York-Shipley makes no allegation whatsoever as to their inability to perform based on lack of materials. Indeed, the transcript of the examination (attached herein) is replete with attempts, by York-Shipley's attorney, to obtain admissions by the witness that his failure to pay was the primary cause for the failure in delivery. For example, on page 5 of the examination, the defense attorney refers to the term in the contract of "certified check in advance of shipment" and questions the witness on this point extensively. Again on pages 12 and 14 of the examination, Peters is questioned solely on his failure to send a check in advance of shipment and on a collateral issue that had nothing to do with either cause of action. The date of this Examination Before Trial was May 16, 1975, almost a full year before trial.

Further, in the Examiration Before Trial of Lavern Brenneman, President of York-Shipley, by the attorney for Thermal Unit, Brenneman makes no reference whatsoever

about York-Shipley's inability to perform because of lack of materials. In fact, on page 15 of the E.B.T., Brenneman is asked why the delivery date was continually pushed back. His only answer was, "I only know from looking at the record that there were numerous delivery dates given." We can infer either that Mr. Brenneman knew there were materials available for use on this order or he was trying to help conceal York-Shipley's clandestine defense of impossibility.

For almost a full year before trial, we had no indication of any other defense other than those presented in the answer. The appellant was prepared at trial to meet these issues in the courtroom. The only notice Thermal Unit had of any shortages were alluded to in two short memos sent to Thermal Unit at this time (Pl. Ex. 5 and 7). These were both vague and misleading when read in contex of the whole evidence, as the Court noted (43a). and as later discussion will show. Yet when York-Shipley proceeded to amend its pleadings to the proof the Trial Court approved (47a).

Rule 15(A) of the Federal Rules of Civil Procedure state that a party may amend his pleadings and "leave shall be freely given when justice so requires" and (B) "The court may allow pleadings to be amended and shall do so freely when the presentation of the merits of the

action will be subserved thereby." Leave is traditionally given for the party to amend the pleadings and answers to conform to the evidence. The rule is based on fairness and should itself be used when the circumstances of the case allows.

However, the court should not give leave to amend where it will fairly prejudice the opposing party. See Archbold v. McLaughlin, Dist. of Columbia, D.C., 181 F. Suppl.175 (1960).

The Federal Courts have continuously denied leave to amend at times when the adverse party is taken unawares by the change of tactics of the opposing party. Even though the Federal Courts have faithfully followed the rule permitting an amendment to pleadings, they have just as faithfully struck down amendments to conform when it ultimately places the opposing party in an unequal position.

> Leave to amend should be denied where amendment would cause substantial prejudice to a party to the action.
>
> Strauss v. Douglass Aircraft Co. C.A.N.Y., 404 F 2d 1152 (1968).
>
> See also Traxel Mfg. Co. v. Schwinn Bicycle Co., C.A. Tenn., 489 F 2d 968 (1973).

If an amendment, in other respects proper, does not surprise the adverse party, it may be properly allowed and leave to amend will be liberally granted where the proposed amendment will not so change the case as to cause surprise to the other party. On the other hand, no party shall be"called in court prepared to try one issue and then be required to try another." (71 C.J.S. 597 § 281). If it is the first time he has notice of such a defense, the discretion of the court should be so exercised so as to prevent surprise.

Perhaps this position is most succintly stated by the District Court in Maryland:

> Fact that courts have taken a very liberal attitude toward motions to amend does not mean that leave to amend must be granted in all cases; generally the courts must follow the rule that pleadings may be amended where justice so requires; this standard implies its negative, that is, when injustice, as undue prejudice would occur, amendments may not be made.
>
> Johnson v. Helicopter & Airplane Services Corp., D.C. Md., 389 F. Supp. 509 (1974).

The appellee's eleventh hour actions had severely prejudiced Thermal Unit's case as it was not given fair opportunity to answer such contentions. See Grummit v.

Sturgeon Bay Winter Sports Club, D.C. Wis., 197 F. Supp. 211 (1967).

"Prejudice" in this sense has been defined as "meaning undue difficulty in prosecuting lawsuits as a result in change of tactics or theories on part of the other party." Deakyne v. Commissioner of Lewes, C.A. Del., 416 F 2d 290 (1960). Little or no reason was given by York-Shipley for their late change in tactics. They had been "sitting" on this defense for about a year before bringing it before the Court. It is the appellant's belief that upon examing the appellant's trial brief, they decided their position was now unmeritorious and decided to surprise Thermal Unit with this defense in the hopes of escaping this obvious breach. The appellant contends it was "bad faith" on the part of York-Shipley to so totally amend at this time. When a party amends to such a completely new defense, the party seeking to amend must show good faith. Kursheed Mfg. Co. v. Rosenziveig, 189 App. Div. 217, 178 N.Y.S. 430 (1929). As the New York Courts have stated:

> Knowledge of facts at the time of serving original pleadings which facts are the basis for the proposed amendments and the consequent intentional omission of such facts from original pleadings is always deemed a suspicious factor requiring explanation.
>
> Rose v. Rose, S. Ct., N.Y. County, 115 N.Y.S. 2d 68 (1952). See also, Ozark Airlines v. Delta Airlines, D.C. Ill., 63 F.R.D. 69 (1974).

The defense of impossibility of performance was a totally new issue which came as no small surprise to Thermal Unit and one which appellant was totally unprepared to answer on such short notice. As the record will show, Thermal Unit made a timely objection on the beginning of the second day of trial (46a). Such objection was denied by the Court and we believe in this respect error was committed.

The appellant therefore moves that such a defense be struck and York-Shipley be limited to their defenses enumerated in their answer which was filed almost one full year before trial. Again, York-Shipley had more than ample time to amend before trial, as their knowledge to this defense would be the same throughout this period. Yet Appellees did not choose to disclose it until trial began; a period of almost one full year.

> Claims should have been raised in original answer, and leave to amend. . . four years later should have been denied in view of prejudice to plaintiff who if (it) had been timely pleaded, could have brought another action.

Strauss v. Douglass Aircraft Co.
C.A.N.Y., 404 F 2d 1152 (1968).

By virtue of the impropriety of this defense, therefore, appellant moves that York-Shipley be limited to the

defense in their answering papers. Appellant further moves for a reversal on the first cause of action, and a finding of liability on the part of York-Shipley.

POINT 3

BASED ON THE ENTIRE PROCEEDINGS BELOW YORK-SHIPLEY IS LIABLE TO THERMAL-UNIT FOR BREACH OF CONTRACT

A) THERMAL UNIT OWED NO DUTY TO PAY IN ADVANCE OF MANUFACTURE BASED ON PAST COURSE OF DOING BUSINESS

Course of doing business as defined by the controlling Uniform Commercial Code is:

> . . . a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions. . ..
>
> U.C.C. 1-205(A)

It is Thermal Unit's contention that this provision, in conjunction with existing case law and the evidence, established that Thermal Unit was not required to advance the certified check until notification was received that the boiler was ready for shipment as York-Shipley claims in its "Answer" to the first cause of action.

The two parties have had a long mercantile relationship in which they have established that payments were

to be made upon notification that the boilers were complete and ready for shipment(13a,23a-25a). The establishment of this course of dealing is important so as to negate any weak contention by York-Shipley that Thermal Unit had to meet a condition precedent of payment in order for them to manufacture the boilers.

The U.C.C. and case law go far in their support of the value of considering evidence of course of doing business in interpreting the terms in this contract.

U.C.C. 1-205(3) states:

> A course of dealing between parties. . . are given particular meaning to supplement or qualify terms of the agreement.

The Courts have long recognized the importance of course of doing business and have accorded it primary consideration in relevant contract decisions. The Federal Courts have long recognized this concept as a basis of great influence. They have stated, "Where parties to contract have given the contract a practical construction by their conduct or course of dealing, such interpretation will be adopted by the court." Shipley v. Pittsburgh and L.E.R. Co., 83 F. Supp. (1949). An early opinion of the Supreme Court, speaking broadly, said that a general custom is a general law of a contract on the subject matter and controls the stipulations of the contract. U.S. v. Arrendando, 9 L. Ed. 283 (1804).

A primary requisite and element of course of dealing, as to a contract and its effects upon it, is the length of time it has existed. If it has existed for a sufficient length of time to be generally known to the parties, then it can be assumed the contract was made and carried out in reference to it and such course of dealing is controlling. Albert v. State Bank, 138 N.Y.S. 237 (1912). It has also been held that in an established course of dealing, it is presumed the parties knew and acted in reference to it and those engaged in the business what to meet. Fireman's Fund Ins. Co. v. American Merchant Marine Ins. Co., 206 N.Y.S. 683 (1924).

In summary on the importance given course of dealing then:

> The high position occupied in the law by customs and course of dealings is evidenced by the consideration which the courts have given to the subject and the importance they have ascribed to well established practices.
>
> 21 Am. Jur. 2d Custom & Usages § 3

It is obvious therefore that the parties course of dealing will be of great import to this case. More specifically, it will totally negate York-Shipley's contention that Thermal Unit had to make payment in advance. The parties custom was contrary to this and such custom should

be afforded "great or controlling weight." Payment was only made upon notification that the order was complete, notification which admittedly was not sent (49a) (E.B.T. of Brenneman, p. 17) (11a).

York-Shipley will aptly point out, however, sections in the U.C.C. that will state course of dealing is not controlling in this case. More specifically, U.C.C. 1-205 (4) states:

> . . . course of dealing. . . shall be construed wherever possible as consistent (with the express terms of the agreement), but when such construction is unreasonable express terms control. . . course of dealing.

Thermal-Unit does not deny such express term (for payment in advance) in Count I nor, obviously, does it deny the existence of this and other applicable Code provisions; i.e. (2-208 (2)). However, a closer and more thorough examination of applicable law reveals that this provision is not controlling. The Code itself gives the answer to the question of applicable law. U.C.C. 2-202(A) states:

> . . . terms. . . may be explained or supplemented a) by course of dealing. . . or usage of trade or course of performance.

The Code annotations to this section shed more light

on th's area, stating:

> Paragraph (A) makes admissable evidence of course of dealing. . . to explain or supplement the terms of any writing. . . in order that a true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings. . . were taken for granted.

> The N.Y. Annotation to this section states:
>
> This subsection would change the rule in N.Y. that evidence of course of dealing is inadmissable unless the contract is ambiguous. The Code allows such evidence where the meaning of the words or other manifestations is not ambiguous or uncertain.
>
> McKinney's v. 62 1/2 p. 158 N.Y. Annotations to 2-202(A).

The Federal and State Courts have long recognized the importance of inclusion of course of dealing evidence even when it contradicts expressed terms in the contract. Hence numerous decisions have been handed down by them supporting this contention.

> Interpretation of contract terms depends upon the meaning the parties attribute to them,

> their practice in applying them to past situations and other factual questions.
>
> Neumann v. Bastian - Blessing Co. 71 F. Supp. 803 (1947)

> The expressions on contracts are not conclusive. . . courts ignore language of a contract which is at variance with the conduct of the parties.
>
> Colorado Mill and Elevator Co. v. Glenn, 118 F. Supp. 943 (1954).

It is obvious therefore the courts will look to the past, practical construction the parties have placed on previous contracts to establish the true intentions of the parties in the present instance. Such practical construction given by the parties as evidence by their past dealings "is entitled to great weight." Brooklyn Life Insurance v. Dutcher, 95 U.S. 269 (1877).

Courts in the past have held the terms of the contract "coupled with the meaning they have acquired by practical application" determine nature of relationship created by contract. Gaulden v. Southern Pacific R.R., 78 F. Supp. 65 (1948). And finally past "conduct of parties is controlling despite written agreements." In Re Cut Rate Furniture, 163 F. Supp. 369 (1958).

The Federal Courts are not the only courts to render such opinions. The Pennsylvania Courts themselves have stated:

> When a court is asked to say what parties meant or intended by their contract, court can point to parties own construction of it as evidenced by their course of doing business.
>
> Commonwealth to Use of Herzog v. Henry W. Horst Co., 364 Pa. 403 (1950)

The strongest language used by the courts on this issue has been evidenced in the most recent cases. These cases strongly support Thermal Unit's contention that course of dealing not only carries great weight, it supersedes the expressed terms of contract.

> Expressions in contract are not conclusive of relationships that arise between parties as result of method of transacting business actually conducted between them, and courts will ignore language of contract which is at variance with conduct of parties. Sioux City and New Orleans Barge Lines Inc. v. Brunson, 243 F. Supp. 1198 (1965).

It has also been held that the Court of Claims could properly rely on how the parties acted under arrangements before advent of the controversy to discover und ıg intention of the parties. Macke Co. v. U.S., 467 F. 2d 1323 (1972). In Colombia Nitrogen Corp. v. Royster Co., 451 F. 2d 3

(1971), Court Appeals 4th Circuit, the Court held "that a finding of ambiguity is not necessary for the admission of extrinsic evidence about. . . the parties course of dealing." And the N.Y. Courts have held, "Parties through previous or subsequent conduct may place their own construction on its' terms." Neuhaus v. LIRR Co., 292 N.Y.S. 2d 930 (1968) App. Div. 2nd Dept.

> In every term of contract great weight attaches to the course of dealing of the parties and where it appears from the conduct of the parties. . . (even if there was a written instrument, negotiations) were adhered to by both parties during an extensive course of dealing. Associated Hardware Supply Co. v. High Heel Distributing Co., 236 Fed. Supp. 879 (1965).

The court's interpretation of Thermal Unit's contention is most succintly summed up in a quote from Columbia Nitrogen case infra p. 26.

> Course of dealings. . . unless carefully negated are admissable to supplement terms of any writing and that contracts are to be read on the assumption that these elements were taken for granted when the document was

phrased. Since the Code assigns course of dealing and trade usage unique and important roles, they should not be conclusively rejected by reading into them stereotyped language that makes no specific reference to them.

In summary then on this issue, the courts give great if not controlling weight, in every instance, to course of dealing. The modern trend, as established by the State and Federal Courts and the Code itself, is to supplant or override expressed terms of contract in relation to course of dealing.

York-Shipley's contention, in their Answer, of payment in advance, is therefore unfounded. Past course of doing business shows that payment was only to be made when the boiler was completed and ready for shipment. York-Shipley, throughout the record and in the Examination Before Trial of Levern Brenneman, admits the boiler was never built (E.B.T., p. 17)(11a)(49a line 8-12).Therefore, York-Shipley may not be permitted to hide behind the term of payment in advance as escape from the contract, as past course of doing business dictated payment was not required at any time during this period.

B) YORK-SHIPLEY OWED THERMAL-UNIT A DUTY TO ALLOCATE MATERIALS UNDER U.C.C. 2-615

York-Shipley, in its closing argument, makes reference to UCC 2-615(A) as supporting authority for their assertion, in the first cause of action, that they may be excused from the contract on the basis of impossibility of performance (76a). The section would basically excuse York-Shipley from performance on this basis. However, upon closer examination of this section of the Code and admissions made by York-Shipley in the record, Thermal-Unit will show that York-Shipley's reliance upon this section is unfounded and that York-Shipley owed a duty to allocate to Thermal Unit any materials they had in stock that were fit to build the boiler in question.

York-Shipley states that some amount of the boiler plate material necessary to construct the Tuck boiler had arrived in late October and early November (tr 165). York-Shipley's attorney (76a) quotes from UCC 2-615(A) which states:

> . . . Seller who complies with paragraphs (B) and (C) is not in breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which

was a basic assumption on which the contract was made.

This section, by itself, apparently releases York-Shipley from the contract if their contention of impossibility is to be believed. The Code, however, requires that paragraphs (B) and (C) must first be adhered to. York-Shipley, at its summation, carefully neglected to completely read into the record these two prerequisites and their ramifications.

Paragraph (B) states:

> Where causes mentioned in paragraph A affect only part of the seller's capacity to perform, he must allocate production and deliveries among his customers.

As already stated, Lavern Brenneman, a witness for York-Shipley, testified that there was enough of the required materials at their disposal already to build the Tuck boiler and save the contract. York-Shipley owed a duty to allocate some of these materials to Thermal Unit. Its failure to do so was in violation of the appropriate U.C.C. provisions and the Trial Court's failure to recognize this allocation rule was legal error in the record.

This allocation doctrine is not there at the option of the seller. It is a rule that must be followed by the seller in cases where material is scarce and there are

customers waiting for their orders to be filled. As the Federal Courts have stated:

> The Code section requiring seller to make reasonable allocations of supply among customers was intended to partially excuse performance of an existing contract when full performance of the contract becomes impossible.
>
> North Penn. Oil and Tire Co. v. Petroleum Co., 358 F. Supp. 908 (1973).

We see then that the Court's have interpreted U.C.C. 2-615, in its entirety, as only a partial release from the contract for the seller. Where circumstances exist that some materials are available, the seller must allocate reasonably. He cannot pick and choose which order to fill and he can certainly not use this section to terminate a contract which turns out to be a bad business bargain. York-Shipley hoped to "hang its hat" on the establishment of impossibility of performance but, by an examination of its own admissions in the record and complete interpretation of the Code, we find this to be ill-founded.

As the Supreme Court of Georgia has stated:

> Where the contract provided that the seller would sell and deliver to buyer latters propane gas. . . seller was permitted to allocate among its customers. . . under UCC 2-615 and

> parties to the contract were bound by the rule of allocations absent an affirmative provision in the contract that seller would perform the contract even though contingencies which permit allocation might occur.
>
> Mansfield Propane Gas Co. v. Folger Gas, 231 Ga. 868, 204 WE 2d 625 (1974).

McKinney's Commentaries to the Code sheds additional light for interpretation to this section, stating:

> There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail.
>
> McKinney's Commentary, UCC 2-615, v. 48, p. 561.

and further:

> However good faith requires. . . that seller exercise real care in making his allocations and in case of doubt, his contract customers should be favored and supplies prorated evenly among them regardless of price.
>
> infra, p. 563.

We see then that the Code again requires more under 2-615 then York-Shipley would lead us to believe. No

where in the record is it stated that York-Shipley used all measures to obtain steel elsewhere. Indeed they state that little or no effort was made to obtain steel elsewhere outside of their four normal delivery mills (45a). It is simple deduction, therefore, that York-Shipley had "no excuse" to cancel the contract under the veil of impossibility.

The preceding comment requires that the seller make a "good faith" effort to allocate fairly among his customers. Again, no effort was made at all to allocate to Thermal Unit. How could it possibly be said that York-Shipley met the requirements of good faith? Indeed, this is yet another violation of UCC 2-615 which York-Shipley incompletely cited.

UCC 2-615(c) goes on to state:

> The seller must notify the buyer seasonably that there will be a delay or non-delivery and when allocation is required, under paragraph (B), of the estimated quota thus made available to the buyer.

Here again was another violation of the Code that was not recognized by the Trial Court. It was not until two months after the signing of the contract that a brief ambiguous memo was sent to Thermal Unit stating a delay because of some type of shortage or delay in manufacture

(Pl. Ex. 7). Indeed, a month before this, a more complete memo was sent to Thermal Unit stating delivery would be made upon receipt of certified check in advance (Pl. Ex. 4). Can it rationally be said that the defense of impossibility could lie where three weeks before York-Shipley notified Thermal Unit of delay because of some type of delay in manufacture or shortage they said they would deliver upon receipt of certified check in advance? In light of these facts, can it rationally be said that York-Shipley adhered to the spirit of UCC 2-61' (c) requiring notification of delay and allocation?

In conclusion, Thermal Unit contends, based on a correct and complete reading of UCC 2-615 and its applicable case law, the York-Shipley breached its duty to allocate materials to Thermal Unit, and there was no good faith effort to obtain material elsewhere as they were required to do under the Code. Further, there was no seasonable notification of delay under UCC 2-615(c). For these reasons, Thermal Unit contends it was error that the Trial Court failed to recognize these applicable sections of the Code. York-Shipley should have been barred from relying on the defense of impossibility and therefore reversal in the first cause of action is warranted.

POINT 4

TRIAL COURT ERRED IN NOT AWARDING DAMAGES FOR GOOD WILL TO THERMAL UNIT IN BOTH THE FIRST AND SECOND CAUSE OF ACTION

The original complaint, issued by Thermal Unit, requested damages for loss of profit and loss of good will. The Trial Court, upon handing down judgement, awarded damages for loss of profit in the second cause of action but ignored claims for loss of good will. Thermal Unit contends this was error on part of the Trial Court as a brief examination of the applicable case law will establish.

Good will of a business is a concept that contains many different facets. As an early decision of the Supreme Court has stated:

> The good will of a business is that element of value which inheres in the fixed and favorable consideration of customers arising from an established and well known and well conducted business.
>
> Des Moines Gas. Co. v. Des Moines 238 U.S. 153, 35 S. Ct., 811 (1911).

We see then that the court has established good will as an "element of value" and as such should be protected

by the courts when damage has been sustained.

> A business institution by handling only goods of high quality, by fair dealing and honest advertising. . . will establish a business reputation or good will, though intangible, is of great value and it entitled to protection the same as any other property right.
>
> Telchon Inc. v. Telecon Corp., 97 F. Supp. 131, Aff. 198 F 2d 903 (1951). See also: American Eulentic Welding Alloy Sales Co. v. Garcia Rodriguez, 353 F. Supp. 850 (1973).

Good will has been said to be the advantage or benefit acquired by an establishment beyond the value of its stock or property, in consequence of the general public patronage which is received from customers because of its local position or reputation for skill or punctuality or other circumstances. York-Shipley, by its failure to deliver and subsequent breach, has damaged this reputation and should be made to compensate Thermal Unit for such damage.

The term "good will" has also been used to refer to the expectation that persons with whom one has been dealing will continue to act in a certain favorable manner. Early New York decisions have generally regarded it as constituting a species of incorporal property

which is a valuable asset of the business of which it is a constituted part. (Godley v. Crandall and G. Co., 212 N.Y. 121 (1947).

The elements of good will will include its continuity in one place, location, length of time the firm has been engaged in a particular business, but most importantly the business reputation the firm has acquired (25 N.Y. Juris. p. 215). A damage to this reputation must be compensated for just as a slander to reputation will be compensated in a real person.

Thermal Unit's business reputation was damaged to a very large extent. It was forced to lose two very important customers because of York-Shipley's breach (32a-34a).

In the competitive field in which Thermal Unit deals, this can become an extreme detriment. York-Shipley had total disregard for the position of Thermal Unit as evidenced by the record (40a, 51a-52a). This breach had the direct effect of harming the business reputation of Thermal Unit in the eyes of these companies (as the cancelled orders prove) and in all certainty in the eyes of future customers.

How then, can the measure of damages for this injury be established? The Courts have recognized that good will, being the intangible it is, is beyond the direct proof of damages associated with loss of profit.

In general, the remedies that are obtainable for the enforcement and protection of rights arising out of good will are such as are ordinarily available at law or in equity in cases of breach of contract.

Although the measure of damages is usually difficult of exact computations, this will not preclude recovery.

> Where substantial injury has been suffered by buyer because of seller's failure to deliver material according to schedule, redress will not be denied because precise limits of the injury cannot be ascertained since the law does not require absolute exactness in fitting damages and no higher degree of certainty is required than the nature of the case admits.
>
> Gulf States Creosoting Co. v. Loving, 120 F 2d 195 (1941). See also, Chemetron Corp. v. Mclouth Steel Corp., 381 F. Supp. 245 (1974).

Can it be said that Thermal Unit did not suffer any loss of good will to his business reputation? He has already lost two large paying customers by his failure to meet their contractual needs. It is not beyond belief, indeed it is in all probability, that he has lost their future business considerations as a result of York-Shipley's breach.

> As the California Courts have stated:
>
> Recovery by a painting contractor for loss of good will. . . is not precluded by the absence of evidence as to loss of specific customers where such items of proof are not available to the plaintiff. . .. A defendant whose wrongful act causes an injury will not be heard to complain that the amount cannot be determined with mathematical precision.
>
> Stott v. Johnson, 36 Cal. 2d 864, 229 P 2d 348 (1951).

The Courts have determined, therefore, when good will is damaged by a defendant's breach it cannot be calculated by any precise formula. Thermal Unit's request for reimbursement for damage to his reputation is not, by any means, outlandish, upon examination of his loss of profit and large paying customers. As a notable authority goes on to state:

> In such circumstances, the court said that it was reasonable to conclude that damages for the loss of good will were within the contemplation of the parties as a detriment directly and naturally resulting from the breach. . . and plaintiff's right to an appropriate allowance for such loss was not open to dispute. . .. Setting out the general rule that while a

> plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, yet once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment.
>
> 28 A LR 2d 591

It has been proven that such damage was contemplated by both parties (40a). Officers for Thermal Unit made numerous calls and requests to York-Shipley for the boilers and made known to them he was losing large accounts forever because of York-Shipley's delay and subsequent breach.

For these reasons, it was error for the Trial Court to ignore damages for loss of good will and Thermal Unit now moves that this Court reinstates such damages at the level requested by Thermal Unit in its original complaint as they are fair and reasonable in light of the substantial damage done to Thermal Unit by York-Shipley.

CONCLUSION

JUDGEMENT BELOW IN THE FIRST CAUSE OF ACTION SHOULD BE REVERSED AND DAMAGES FOR GOOD WILL BE AWARDED IN BOTH THE FIRST AND SECOND CAUSE OF ACTION

York-Shipley, in its attempts to escape the contract, gave conflicting reasons for non-performance which Thermal Unit has either answered or exposed as a sham by their very contradictory nature.

The conclusion can only lead in one direction; that York-Shipley intentionally tried to remove himself from the contract as he considered it a bad business bargain.

Upon examination of the record and applicable case law, the judgment should be reversed in the first cause of action and damages for good will be awarded in the first and second cause of action to the full extent requested in the original complaint.

Contracts and dealings between businessmen are not handled in this manner. The courts have historically held this for many years. It is Thermal Unit's belief that the Court here will recognize the true damage done to Thermal Unit and accord it full satisfaction for such damage done by York-Shipley.

Respectfully submitted,

William K. Madden
Attorney for Plaintiff-
Appellant

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

THERMAL UNIT CL CORP.,

Plaintiff-Appellant,

- against -

YORK-SHIPLEY, INC.,

Defendant-Respondent.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Eugene L. St. Louis, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1235 Plane Street, Union, New Jersey 07083. That on the 11th *day of* **November** *19* **76**, *deponent served the annexed*

briefs *upon* **Goldman, Horowitz & Cherno** *attorney(s) for*

Defendant-Respondent *in this action, at* **P.O. Box 630 390 East Old Country Rd. Mineola, N.Y. 11501**

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* S *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 11th *day of* **November** *19* **76**.

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Eugene L. St. Louis

Print name beneath signature

Eugene L. St. Louis